

**90-746**

No.

IN THE

Supreme Court, U.S.

FILED

SEP 24 1990

JOSEPH F. SPANIOL, JR.  
CLERK

# Supreme Court of the United States

October Term, 1990

WILLIAM KUNTZ, III,

*Petitioner,*

*against*

THE LITTLE MIAMI RAILROAD COMPANY,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS,  
EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO.

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### Corrected Petition for a Writ of Certiorari

---

WILLIAM KUNTZ, III

*Pro Se*

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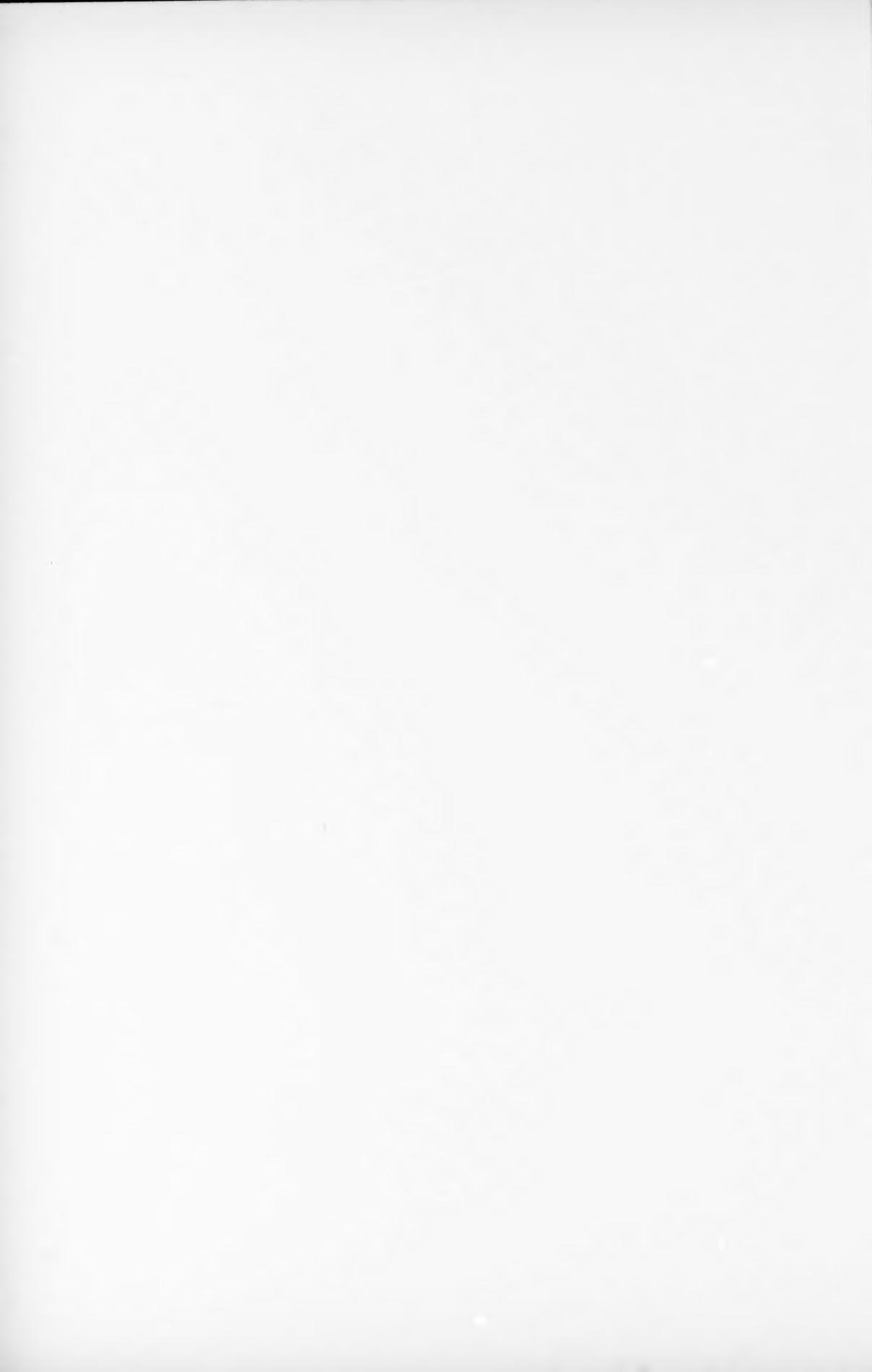
Old Arsenal Hill  
Westport, NY

Dated: November 7, 1990

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THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990

(4348)



i.

**Question Presented.**

That the Court of Appeals for the Eight District of Ohio at Cleveland denied petitioner equal protection under the United States Constitution between the citizens of the various states by the application of a Local Rule of Court in dismissing his appeal from the Common Pleas Court of Cuyahoga County, Ohio.

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No.

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**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990.

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WILLIAM KUNTZ, III,

*Petitioner,*

*against*

THE LITTLE MIAMI RAILROAD COMPANY,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO.

---

**PETITION FOR A WRIT OF CERTIORARI.**

**Opinions Below.**

The order of the Supreme Court of Ohio dated June 27, 1990, is printed herein as Appendix A. The opinion of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, dated February 5, 1990, is printed herein as part of Appendix C. The opinions of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga,

dated March 12, 1990, are printed herein as Appendices D, E and F.

### **Jurisdiction of the Court.**

The jurisdiction of the Court is invoked under 28 U.S.C. 1257.

Sua sponte Order of the Court of Appeals dismissing petitioners appeal dated February 15, 1990.

Order for reinstatement denied March 12, 1990.

Motion for leave to appeal to the Supreme Court of Ohio dismissed June 27, 1990.

Petitioner first raised the federal question of equal protection in his motion before the Supreme Court of Ohio.

### **Statement of the Case.**

Petitioner is an individual resident of the State of New York. Respondent Little Miami Railroad is a subsidiary of the Penn Central Corporation.

This case stems from one of the 'rich uncle' cases of the modern bankruptcy era. *In the Matter of Penn Central Transportation Company, debtor.* United States District Court for the Eastern District of Pennsylvania, Case 70-347.

Petitioner was a minority shareholder of the Little Miami Railroad Company. Little Miami, the respondent, was a leased line of Penn Central owning track and property between the Ohio River in Cincinnati, Ohio, and downtown Columbus, Ohio, and various points between

including, Dayton, Xenia and to Richmond, Indiana. After the settlement of the conveyance case framework which led to the formation of Consolidated Rail Corporation, a/k/a Conrail, and the conveyance by deed of almost all of Penn Central's Rail assets, including portions of Little Miami Railroad property, it was discovered that Penn Central did not own 100% of the outstanding shares of Little Miami Railroad. As a result of an analysis on behalf of the debtor Penn Central, it was concluded that an acquisition of Little Miami would enhance the payment to Penn Central in the valuation case which would determine the actual value of the assets which were conveyed to Conrail.

Accordingly, on June 25, 1979, a petition was heard before the Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, who presided over the Penn Central case, for an approval to implement a settlement with Little Miami. Little Miami had never been in bankruptcy and remained solvent during the pendency of the Penn Central case. All the officers and directors of Little Miami were directly or indirectly employees of Penn Central.

Petitioner attended said hearing and objected to the proposed settlement as under-valued with regards to the assets of Little Miami Railroad. It was pointed out to the Court that the settlement provided for appraisal rights under Ohio Law. The Bankruptcy Court approved the settlement over the objection of petitioner observing that dissenters have the right to ask for fair market value pursuant to Ohio statutes.

Several months later, petitioner returned to Philadelphia and voted his shares against the proposal at a special meeting of the shareholders. Subsequent to that peti-

tioner made a demand upon the corporation for the fair market valuation of his shares based on his knowledge, respondent rejected petitioner's demand and, on January 15, 1980, petitioner filed his complaint in the Common Pleas Court of Cuyahoga County, Ohio, in Cleveland. Due to the Arcane Provision of Ohio Law, the complaint had to be filed in the county where the 'company' maintained its office, in this case c/o Prentice Hall Corporation, a company which accepts process service. All of Little Miami Railroads assets were located some 120 miles south between Columbus, Ohio and Cincinnati, Ohio and points between.

As illustrated by the appearance and execution Docket of the Common Pleas Court (Appendix I), a trial commenced June 3, 1983, to consider the appraisal made by the person selected by respondents and approved by the Court. In September, three months after the commencement of the trial, respondent moved to continue the trial and moved to take the disposition of petitioner's expert witness.

Over the next seven years, respondents never in fact took the disposition of petitioner's witness, notwithstanding the fact that that witness maintained offices in the same county as respondent's lead counsel. Over the next seven years, petitioner's trial counsel, Michael J. McDonald, was required to make several needless trips to Cleveland from Dayton, Ohio, where he maintained his office. (Appendix I). In late November, 1989, on the verge of the resumption of the trial, respondents filed a motion to dismiss for failure of the petitioner's part to prosecute the case.

In New York Parlance, the motion was "slow pitched" to petitioner's counsel, i.e., express mail to the Court in

Cleveland, and certified mail to Mr. McDonald who, by virtue of being a sole practitioner, did not have a large staff to run to the Post Office to pick up certified mail.

As a result, the moving papers were not even obtained by trial counsel for petitioner until respondent's motion was granted.

Upon learning that an order dismissing the case had been entered, petitioner immediately filed a Notice of Appeal to the Court of Appeals of Cuyahoga County, Ohio Eight Appellate District.

The Court of Appeals dismissed the appeal *sua sponte* for failure to comply with a local rule of Court.

The gist of petitioner's assignment of error to the court is that by the operation of the Local Rule of the Court of Appeals of Cuyahoga County, equal protection is not afforded to citizens of other states as would be available in say the Second Appellate District of Ohio.

Petitioner is not seeking the treatment that he might obtain in New York Courts, instead he is seeking equal treatment in each Court in Appellate Review in Ohio.

Petitioner was required to perform as additional act, i.e., file a praecipe with the clerk under the local rule which was not required under the Ohio Rules of Civil Procedure.

Such an oversight, once petitioner learned of the local rule, was corrected.

The question of technical failure to comply with Local Rules in Ohio has been considered in *O'Brien v. Stein*, 47

Ohio App. 3D 191, appellate procedure, technical failure to comply with local rules not ground for dismissal.

That case relied upon the reasoning in *Dehart v. Aetna Life Insurance Company*, (1982), 69 Ohio St. 2D 138, 230.0 3D 210, 431 N.E.2D 644.

"All of the documents relevant to the disposition of this appeal are contained in the record. As such, dismissal of this appeal for such a technical reason would be inconsistent with the policy of deciding cases on their merits."

Further the application of such a rule would deny petitioner equal protection under the federal constitution.

Except for the quirk in Ohio law that the case be brought in the county where the agent for service maintained its office, the action would have been in one of the southern Ohio Counties, where the Little Miami Railroad owned property and track.

Needless to say it was a clever stratagem on respondent's behalf to select a forum which had little relation to the company in question aside from being within the same state but removed by hundreds of miles from the real estate.

It would be difficult if not impossible to convince a Common Pleas Court Judge in Cincinnati, Ohio [Hamilton County] that Little Miami's shares were of little value when the company owned land in downtown Cincinnati. It would also be difficult to convince a judge in Columbus, Ohio [Franklin County] that Little Miami shares were of little value where respondent had sold air rights over track to Nationwide Insurance for the con-

struction of a high rise and convention center in downtown Columbus, Ohio.

As the Court may see, petitioner by the terms of the order received -0-. Not one cent for his shares.

If this Court declines to review this case, aside from the tangential issue of possible securities fraud by Penn Central in that the appraiser disclosed that Penn Central had failed to disclose the pending sale of 53 miles of right of way to the Ohio Department of Natural Resources in the proxy statement, an issue which would not be ripe for litigation until this shareholder valuation is disposed of: The only practical recourse aside from one possible motion in State Court if filed before December 1990, would be to return to the United States District Court in Pennsylvania and present the problem to the District Court for its consideration.

It would be inequitable and unfair for respondent, who has held petitioner's money for 14 years, to keep it without paying the minimal value plus interest as determined by the appraiser, much less the higher value ascribed by petitioner of Little Miami's stock.

Wherefore, petitioner respectfully requests the Court grant said petition.

WILLIAM KUNTZ, III  
Pro se  
Box 1722, Broadway Station  
Albany, NY 12201-1722  
518-962-4966



**Appendix A—Order of the Supreme Court of Ohio  
Dated June 27, 1990.**

**THE SUPREME COURT OF OHIO**

**1990 TERM**

To wit: June 27, 1990

Case No. 90-628

**ENTRY**

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WILLIAM KUNTZ, III,

*Appellant,*

v.

THE LITTLE MIAMI RAILROAD COMPANY,

*Appellee.*

---

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

**COSTS:**

Motion Fee, \$40.00, paid by William Kuntz, III.

(Court of Appeals No. 59136)

**THOMAS J. MOYER  
Chief Justice**



**Appendix B—A Memorandum in Support of Motion for  
Leave to Appeal from the Court of Appeals of Cuy-  
ahoga County, Ohio—8th Appellate District at Cleve-  
land, Ohio.**

IN THE

SUPREME COURT OF OHIO AT COLUMBUS,  
OHIO

---

WILLIAM KUNTZ, III *Pro Se*,  
*Plaintiff-Appellant*,  
vs.  
LITTLE MIAMI RAILROAD COMPANY,  
*Defendant-Appellee*.

Case No. 90-628

---

William Kuntz, III, Plaintiff-Appellant *Pro Se*, Box 1722—Broadway Station, Albany, NY 12201-1722, 518-962-4966.

April 13, 1990 Friday

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## CASES:

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## STATEMENT OF THE FACTS

Plaintiff, William Kuntz, III appealing *pro se* is a resident of the State of New York and a shareholder of the defendant, Little Miami Railroad Company.

Defendant, Little Miami Railroad Company, was a leased line of the former Penn-Central Transportation Company which entered bankruptcy in early 1973. Defendant, Little Miami Railroad Company is an Ohio corporation which was chartered in the early 1800's and owns railroad lines and right-of-ways between Cincinnati, Ohio, Dayton, Ohio, Richmond, Indiana, Xenia, Ohio and Columbus, Ohio including such properties as parts of the ground-lease of the Nationwide Plaza in Columbus, Ohio and property along the Ohio River in downtown Cincinnati.

In the late 1970's as part of a plan to reorganize the affairs of Penn-Central (now Penn-Central Corporation located in Cincinnati, Ohio) parts of the rail assets of the debtor were spun off with the assistance of federal help to form Conrail. Subsequent to that Penn-Central proposed to acquire the rest of the outstanding shares of little Miami-Railroad Corporation.

Plaintiff-appellant dissented from said merger and opted to take his claim for the fair value of his shares to court under Ohio law. In accordance with the requirements, plaintiff-appellant appearing thru trial counsel filed an action in the Common Pleas Court of Cuyahoga County, Ohio in 1980. There the case languished for some 10 years for reasons which may be clear from the record of the case *William Kuntz, III vs. Little Miami Railroad Company* Cuyahoga County Common Pleas Court, Case 80-07544. Plaintiff's counsel was required to make a great number of trips to Cleveland, Ohio from Dayton, Ohio where he maintains his individual law practice. The defendants engaged two law firms of some note, one being in Cincinnati, Ohio and the other being in Cleveland, Ohio.

In November 1989, in what might be termed an *ex parte* motion, defendants sought and obtained a dismissal of the case. From that dismissal, plaintiff-appellant filed a Notice of Appeal and from that appeal this Memorandum in Support is presented to reverse the dismissal of the Court of Appeals.

#### PROPOSITION OF LAW NO. 1

**THAT THE OPERATION OF THE LOCAL RULE OF THE COURT OF APPEALS OF CUYAHOGA INCONSISTENT WITH THE REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION OF THE UNITED STATES BE DEEMED VOID.**

Soon after filing his Notice of Appeal, The Court of Appeals of Cuyahoga County, Ohio (8th Appellate District) dismissed the appeal (Case 59136) *sua sponte* for failure to abide by Appellate Local Rule 4(a).

Local Rule 4(a) provides

'The Clerk of the Trial Court shall not prepare and assemble the documents constituting the Record on Appeal, as defined in Appellate Rule 9(a), unless and until appellant has filed a Prae-  
cipe. If the appellant fails to file a Praecipe within 10 days of filing the Notice of Appeal in the Trial Court, it will be grounds for dismissal of the ap-  
peal . . .'

The Record in the Court of Appeals and in the Motion for Reinstatement by plaintiff-appellant indicates that the Praecipe was filed as soon as plaintiff-appellant learned of the different requirement under the local rule of court from those appeals that he has taken from the Court of Appeals of Montgomery County, Ohio and in any event was within two days of the entry of dismissal. Needless to say, copies of the local rules of the Cuyahoga Court of Appeals are not plentiful in New York State and thus occasioned the short delay in compliance with the local rule.

'The foreword of the local rules of the Eighth Appellate Judicial District provides that . . . these local rules cannot, and are not intended, to do more than supplement the Ohio Rules of Appellate Procedure in appeals to this court. . . .'

Ohio Rule of Appellate Procedure 10 (b) provides that

'The Clerk of the Trial Court shall prepare the certified copy of the docket and journal entries of the case pursuant to Rule 9(d) . . . and transmit the Record upon Appeal to the Clerk of the Court of Appeals . . .'

## ARGUMENT

The Federal Constitution of the United States provides that there be equal protection among the citizens of the various states.

In this case, plaintiff-appellant, a resident of the State of New York, finds his case dismissed due to the operation of a local rule of court which operates in Cleveland, Ohio. The local rules of the Court of Appeals for Montgomery County, Ohio (2nd Appellate District) have no rule which equates to the rule in Cleveland, Ohio. Accordingly the oversight of a local rules which by admission 'therefore, the rules are not designed to provide a comprehensive scheme of local practice. Rather, they complement the rule structure of the Ohio Rules of Appellate Procedure' (foreword 8th district local rules)

Accordingly aside from the harsh and unjust result which flowed from the trial court dismissal of a '*ex parte*' motion (the record indicates that the motion took some 21 days to reach plaintiff-appellant's trial counsel if from Cincinnati, Ohio to Dayton, Ohio and that the motion papers were sent from Cincinnati, Ohio to Cleveland overnight by express service) is only further compounded by the operation of a local rule of court.

While plaintiff-appellant can understand the need as an administrative labor saving device by the courts in Cleveland which must have a heavy caseload, the operation of a local rule with such drastic effect cannot withstand the requirements of the federal constitution.

Needless to say, the procedures in New York for appellate review are somewhat different in what courts of appeals require to perfect all appeals. It is clear that the New York courts are uniform from division to division with the requirements which afford equal protection under the federal constitution. Accordingly plaintiff-appellant submits that the operation of the local rule of Cuy-

**7b**

ahoga County Court of Appeals (8th district) effectively denies equal protection and accordingly the court should grant review.

Respectfully submitted,

**WILLIAM KUNTZ, III**  
Box 1722  
Broadway Station  
Albany, NY 12201-1722  
518-962-4966

Filed Apr. 16, 1990  
**MARcia J. MENGEL, Clerk**  
Supreme Court of Ohio

*Notice of Appeal From the Court of Appeals to the  
Supreme Court of Ohio (Certified).*

IN THE  
COURT OF APPEALS OF CUYAHOGA  
COUNTY, OHIO  
EIGHTH DISTRICT

---

WILLIAM KUNTZ, III,  
*\* Plaintiff-Appellant,*  
vs.  
THE LITTLE MIAMI RAILROAD COMPANY,  
*Defendant-Appellee.*

Case No. 59136

---

Now comes plaintiff-appellant, William Kuntz, III appearing *pro se* of Albany, NY and files this timely Notice of Appeal from the final entry of the Court of Appeals entered on or about 2/15/90, to the Ohio Supreme Court.

Plaintiff-appellant believes that this case involves substantial constitutional questions with regards to shareholders rights and the law of Ohio for shareholders valuation actions.

Respectfully submitted,

WILLIAM KUNTZ, III  
*Pro Se*  
Box 1722-Albany, NY 12201-1722  
518-962-4966

Filed Court of Appeals  
Mar. 10, 1990  
GERALD E. FUERST  
Clerk of Courts  
Cuyahoga County, Ohio

**CERTIFICATE OF SERVICE OF THE NOTICE OF  
APPEAL**

I hereby certify that a copy of the foregoing Notice of Appeal was mailed US Postage prepaid by depositing same in a scaled wrapper in an official depository of the US Postal Service this 14th of March, 1990 addressed to: Mr. John J. McCoy, Taft Stettinius and Hollister, 1800 Star Building, 425 Walnut Street, Cincinnati, Ohio 45202 & Stacy D. Ballin, Squire Sanders and Dempsey, 1800 Huntington Building, Cleveland, Ohio 44115.

**WILLIAM KUNTZ, III**

*Journal Entry, Cuyahoga County Court of Appeals  
(Certified).*

COURT OF APPEALS OF OHIO, EIGHTH  
DISTRICT  
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136  
Lower Court No. CP 07544, Common Pleas Court  
Motion No. 00845

---

WILLIAM KUNTZ, III,

*Appellant,*

vs.

LITTLE MIAMI RAILROAD COMPANY,

*Appellee.*

---

JOURNAL ENTRY

Date 02/05/90

Appeal dismissed *sua sponte* at Appellant's costs for failure to file Praeclipe in accordance with Local Rule 4. Mandate to issue.

Presiding Judge  
JOHN T. PATTON, C.J.

KRUPANSKY, J., Concurs

Copies mailed to Counsel for all parties—costs taxed.

GERALD E. FUERST, Clerk of Courts  
By J. Cautenanal Deputy

Received for Filing  
Feb. 5, 1990  
GERALD E. FUERST, Clerk  
By J. Cautenanal Dep.

Pursuant to Rule 22(D) and Rule 26, Ohio Rules of Appellant Procedure, this decision will be journalized and will become the judgment and order of the court and the time period for review will begin to run, unless a motion for reconsideration with supporting brief is filed within ten (10) days from this announcement of the Court's decision.

The State of Ohio, )  
ss.  
Cuyahoga County )

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal Court of Appeals Vol. 267 pg. 940 dated February 15, 1990 case #59136 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Court of Appeals Vol. 267 pg. 940 dated February 15, 1990 and that the same is a correct transcript thereof.

12b

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 11th day of April A.D., 1990.

GERALD E. FUERST, Clerk of Courts  
By Nora K. Killerne, Deputy Clerk

*Certificate of Service*

I hereby certify that a copy of the foregoing motion to certify and memo was mailed US Postage prepared by depositing same in a sealed wrapper in the state of New York in an official depository of the US Postal Service this 13th of April, 1990 addressed to counsel for the defendant-appellant Little Miami Railroad Company who are:

JOHN J. McCOY, Esq.  
Attorney-at-Law  
Taft, Stettinius & Hollister  
1800 Star Bank Center  
425 Walnut Street  
Cincinnati, Ohio 45202  
1 (513) 381-2838

&

STACY D. BALLIN, Esq.  
Attorney-at-Law  
Squire, Sanders & Dempsey  
1800 Huntington Building  
Cleveland, Ohio 44115

WILLIAM KUNTZ, III

**Appendix C—Decision of Court of Appeals of Ohio,  
Eighth Appellate District, Cuyahoga County.**

Case 59136

Date 02/05/90

---

WILLIAM KUNTZ, III,  
vs.  
LITTLE MIAMI RAILROAD COMPANY.

---

Appeal dismissed *sua sponte* at appellant's costs for failure to file Praeclipe in accordance with Local Rule 4, Mandate to Issue.

PATTON, C.J.,

KRUPANSKY, J., Concur

From:

Court of Appeals of Ohio  
Eighth Appellate District  
Cuyahoga County Court House  
One Lakeside Ave.  
Cleveland, Ohio 44113

To:

Kuntz, William III  
P.O. Box 1722  
Broadway Station  
Albany, New York 12201-1722

Feb. 15, 5:47 PM '90



**Appendix D—Final Entry (Motion No. 01797).**

**COURT OF APPEALS OF OHIO, EIGHTH  
DISTRICT  
COUNTY OF CUYAHOGA**

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136  
Lower Court No. CP 07544 Common Pleas Court  
Motion No. 01797

---

WILLIAM KUNTZ, III,

*Appellant,*

vs.

LITTLE MIAMI RAILROAD COMPANY,

*Appellee.*

---

**JOURNAL ENTRY**

Date 03/12/90

Motion by Appellee to dismiss appeal is denied as moot.

Presiding Judge  
DAVID T. MATIA

DYKE, J., Concurs

Received for Filing  
Mar. 12, 1990  
GERALD E. FUERST, Clerk  
By J. Cautenanal Dep.



**Appendix E—Final Entry (Motion No. 01565).**

COURT OF APPEALS OF OHIO, EIGHTH  
DISTRICT  
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136  
Lower Court No. CP 07544 Common Pleas Court  
Motion No. 01565

---

WILLIAM KUNTZ, III,

*Appellant,*

vs.

LITTLE MIAMI RAILROAD COMPANY,

*Appellee.*

---

JOURNAL ENTRY

Date 03/12/90

Motion by Appellant to extend time to file assignments of error and brief is denied as moot.

Presiding Judge  
DAVID T. MATIA

DYKE, J., Concurs

Received for Filing  
Mar. 12, 1990  
GERALD E. FUERST, Clerk  
By J. Cautenanal Dep.



**Appendix F—Final Entry (Motion No. 01555).**

COURT OF APPEALS OF OHIO, EIGHTH  
DISTRICT  
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136  
Lower Court No. CP 07544 Common Pleas Court  
Motion No. 01555

---

WILLIAM KUNTZ, III,

*Appellant,*

*vs.*

LITTLE MIAMI RAILROAD COMPANY,

*Appellee.*

---

JOURNAL ENTRY

Date 03/12/90

Motion by Appellant for reinstatement is denied.

Presiding Judge  
DAVID T. MATIA

DYKE, J., Concurs

Received for Filing  
Mar. 12, 1990  
GERALD E. FUERST, Clerk  
By J. Cautenanal Dep.



**Appendix G—Motion of The Little Miami Railroad  
Company to Dismiss.**

IN THE  
**COURT OF COMMON PLEAS OF CUYAHOGA  
COUNTY, OHIO**

---

WILLIAM KUNTZ,  
*Plaintiff,*  
v.  
LITTLE MIAMI RAILROAD CO.,  
*Defendant.*

Case No. 80-07544  
(Judge Timothy McMonagle)

---

Little Miami Railroad Company ("Little Miami") hereby moves the Court to dismiss Plaintiff's complaint, at Plaintiff's costs, as the result of Plaintiff's complete disregard of this Court's chambers order of August 7, 1989 and its formal written order of October 6, 1989 (*copy attached*).

In support of this motion, Little Miami refers to the following memorandum and the attached Affidavit of John J. McCoy.

**MEMORANDUM**

On August 7, 1989 during a pretrial conference personally attended by counsel of record, the Court ordered

Plaintiff's counsel to forward Plaintiff's original trial exhibits (over 200 in number) to Defendant's counsel's office by no later than September 8, 1989 and to forward a list of trial exhibits in the order that Plaintiff intended to use them at trial. Further, Plaintiff was ordered to make Mr. Pike Levine, Plaintiff's expert, available at Plaintiff's costs for deposition at Defendant's counsel's office prior to November 8, 1989. Each of these steps was necessary to the parties' and the court appointed appraiser's preparation for the hearing on confirmation of appraiser's report in this case. By journal entry dated October 6, 1989, this Court confirmed each of the foregoing mandates in written form. See October 6, 1989 order (attached hereto as Exhibit A).

The background which led to the need for this order included Plaintiff's repeated violations of the local rules of Court as well as disregard of prior orders issued by the Court regarding disclosure of experts, provision of expert reports, disclosure and listing of trial exhibits, etc. *See e.g.*, Motion of The Little Miami Railroad Company to Preclude The Offer of Expert Testimony By Plaintiff, filed May 4, 1983.

Consistent with a continuing practice of disregard for this Court's orders, Plaintiff has now failed to deliver the trial exhibits to Defendant's counsel office, has failed to provide a list of trial exhibits, and has failed to produce Plaintiff's expert, Mr. Pike Levine, for deposition prior to the deadlines set by the Court. Affidavit of John J. McCoy, Esq., par. 4.

By letter dated September 29, 1989, Defendant's counsel reminded Plaintiff's counsel of the Court's August 7, 1989 order and the fact that Plaintiff had failed to meet the September 8 deadline for providing trial exhibits and an exhibit list. The letter requested that these materials be forwarded promptly and also reminded Plaintiff's counsel that Mr. Pike Levine was required to be produced by No-

vember 8, 1989. A copy of the September 29, 1989 letter is attached to the McCoy Affidavit as Exhibit 1.

By letter dated October 11, 1989, Defendant's counsel enclosed a copy of this Court's written entry (dated October 6, 1989) confirming the August 7, 1989 order. This letter advised Plaintiff that he was in violation of the September 8 deadline by over thirty days and advised that appropriate relief would be requested from the Court if compliance was not forthcoming. A copy of the October 11, 1989 letter is attached to the McCoy Affidavit as Exhibit 2.

Notwithstanding the foregoing "reminders," through today's date the trial exhibits have not been received, the trial exhibit list has not been received, and Mr. Pike Levine has not been produced for deposition. In each of these respects, Plaintiff is in violation of this Court's August 7 order, as confirmed by its October 6, 1989 journal entry.

Civil Rule 37(B)(2)(c) provides that the Court, upon failure to obey a court order to provide or permit discovery, may enter

An order striking out pleadings or parts thereof or staying further proceedings until the order is obeyed, or *dismissing the action or proceeding* or any part thereof, or rendering a judgment by default against a disobedient party . . . (Italics added).

Because of Plaintiff's continuing failures despite repeated reminders, the only appropriate sanction is dismissal of the action, at Plaintiff's costs. As a result, Defendant Little Miami Railroad Company requests that this Court enter an order dismissing this action.

**4g**

**JOHN J. MCCOY**  
Counsel for Defendant Little Miami  
Railroad Company  
John J. McCoy, Esq.  
Taft, Stettinius & Hollister  
1800 Star Bank Center  
Cincinnati, OH 45202  
(513) 381-2838

**STACY D. BALLIN**  
Counsel for Defendant Little Miami  
Railroad Company  
Stacy D. Ballin, Esq.  
Squire, Sanders & Dempsey  
1800 Huntington Bldg.  
Cleveland, OH 44115  
(216) 687-8523

**CERTIFICATE OF SERVICE**

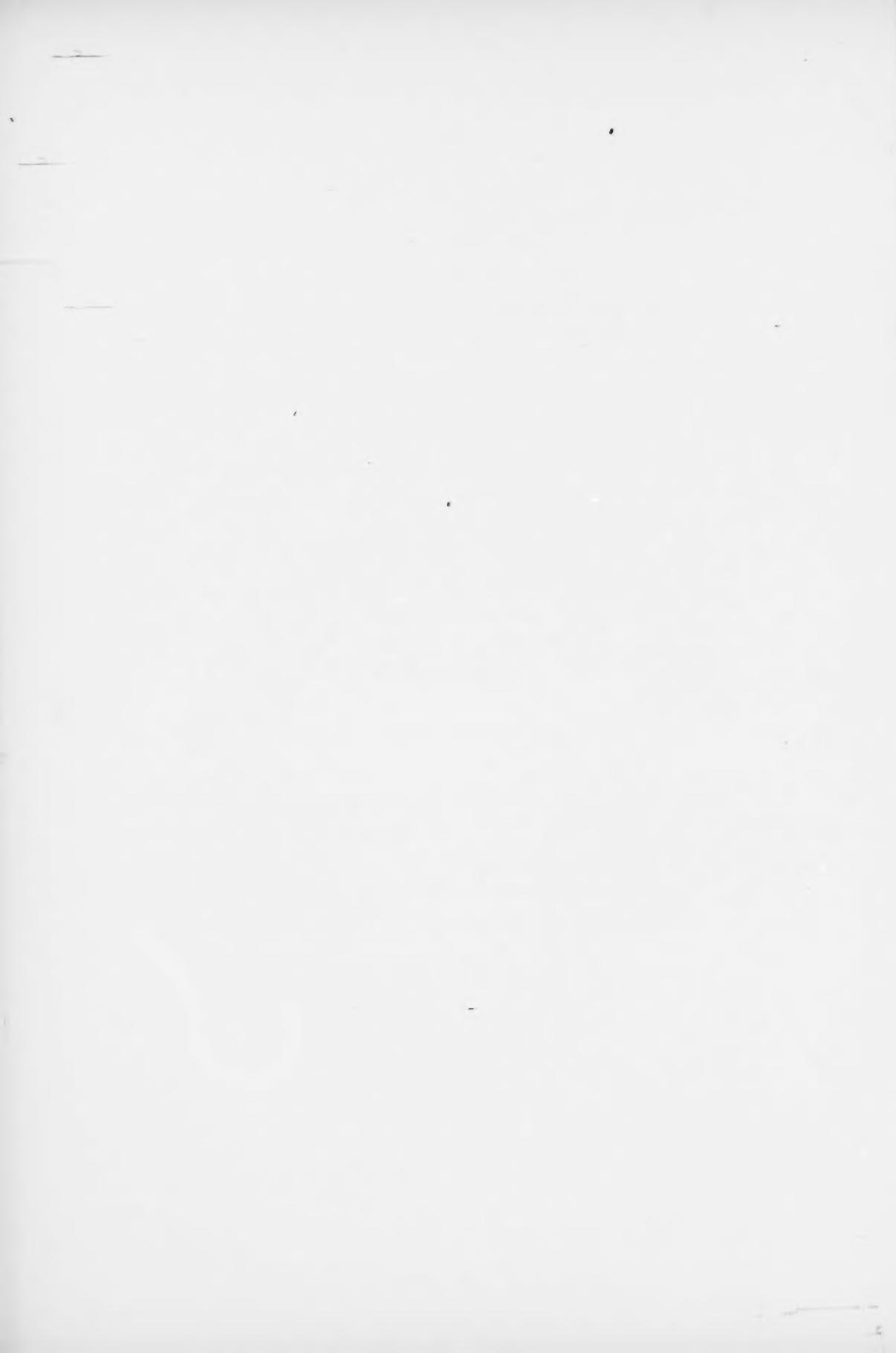
The undersigned hereby certifies that he has served a copy of the Motion of The Little Miami Railroad Company to Dismiss, memorandum in support and affidavit upon counsel for Plaintiff Michael J. McDonald, Esq. by certified mail this 13th day of November, 1989.

**JOHN J. MCCOY**

The State of Ohio  
Cuyahoga County ss.

I, Gerald E. Fuerst, Clerk of The Court of Common Pleas, within and for Said county, hereby certify that the above and foregoing is truly taken and copied from the original Motion of the Little Miami, etc . . . Case No. 80-07544. Now on file in my office. Filed November 14, 1989. Witness my hand and seal of said court this 10th day of December A.D. 1989.

GERALD E. FUERST, Clerk  
By: KAREN FRANCE, Deputy



**Appendix H—Journal Entry Dated December 8, 1989.**

Dec. 8, 1989

Case No. 7544

Assigned Judge: T.E. McMonafe

William Kuntz vs. Little Miami Railroad Co.

(x) Final

(x) Post Card

Date 12/1/89 (*Nunc Pro Tunc* Entry as of & For

Motion of the Little Miami Railroad Company to dismiss is granted. OSJ.

T.E.M.  
Judge

RECEIVED FOR FILING

Dec. 8, 1989

GERALD S. FUERST, Clerk

VOL. 1210, PG. 916

The State of Ohio, )  
ss.  
Cuyahoga County )

I, GERALD E. FUERST, Clerk of the Court of Common Pleas within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original Vol. 1210, pg. 916 dated December 8, 1989 now on file in my office.

2h

Witness my hand and seal of said court this 8th day of February A.D., 1990.

**GERALD E. FUERST, Clerk**  
By Sharla Sasnospas, Deputy

## **Appendix I—Excerpts From Appearance and Execution Docket.**

## APPEARANCE AND EXECUTION DOCKET

020 Bernard Friedman, Judge C 07544-80

Attorney: Michael J. McDonald  
1200 American Building  
Dayton, Ohio 45402  
228-7183

**Parties:** William Kuntz, III  
P.O. Box 926  
Dayton, Ohio 45401

vs.

Little Miami Railroad Company  
c/o Prentice-Hall Corporation Systems, Inc.  
Union Commerce Building  
Cleveland, Ohio 44115

## STATEMENT OF PROCEEDINGS

#1690

Jan. 15, 1980: Complaint filed and summons to be sent by certified mail to defendant.

Jan. 25 1980

Certified mail receipt 412 20671  
Returned by U.S. Postal Dept. Little Miami  
Received by Addressee 1-21-80 \$1.50

Feb 11 1980

**Answer of Def. filed.**

March 10 1980

Stein

Oct 14 1980 Request for Production of Documents  
Filed by pltf.

To Court: Oct 15 1980

Parties to agree on app. of appraiser OLB 11-14-80.

Civil Journal 516

Pg 116

Nov 14 1980 Motion for extension of time filed by deft.

Nov 24 1980

Response to pltf's request for production of documents  
filed by deft.

Dec 17 1980

Deft. selection of an appraiser filed.

To Court: Dec 8 1980

Ext to 11-30-80

Civil Journal 523

Pg 427

Jan 12 1981

Motion to compel (illegible) filed by pltf.

Jan 12 1981

Objection to appraiser filed by pltf.

Jan 16 1981

Motion for costs filed by deft.

Jan 16 1981

Memorandum in opposition to motion to compel filed  
by deft.

Jan 16 1981

Memorandum in support of its selection of an ap-  
praiser filed by deft.

To Court: Jan 21 1981  
Motion to compel GRTD OSJ

Civil Journal 528 Pg 877

To Court: Feb 19 1981  
Motion to compel by pltf is denied. Sanctions also denied to defts.

Civil Journal 533 Pg 744

Apr 10 1981  
Interrogatories of deft filed.

To Court: Sep 1 1981  
Mr. E. Halsey Sanford is appointed appraiser.

Civil Journal 560 Pg 980

Oct 01 1982  
Appraisal report . . . filed

Jan 20 1983  
Pltf pretrial statement filed.

Jan 27 1983  
Pre-trial statement filed by dft.

To Court: Apr 15 1983  
Set for hearing 6/2/83. O.S.J.

Civil Journal 650 Pg 943

May 04 1983  
Motion to preclude offer filed by Little Miami RR.

May 27 1983

(illegible) for witness subpoenae filed by pltf.

May 27 1983

Subpoena for Robert Roderer filed by pltf.

- 2) P. Levine
- 3) Jim Reinolk
- 4) Jefferey Nogauich
- 5) George Stanforth
- 6) William Ericson

Jun 02 1983

Memorandum in support of appraisal filed by deft.

Sep 12 1983

Notice of deposition filed by dfdt.

Sep 15 1983

Deft. files motion for continuance

Dec 16 1985 to Court

P. T. set 2-5-86 @ 1:30

Civil Journal 831

Pg 338

Sep 18 1983

Transcript filed by Penn Central Corp.

To Court: Dec 24 1986

Transferred to Judge Wm. E. Mahon  
Journal 914-543

To Court: Apr 20 1988

P.T. set for 5-25-88 10:30 AM

Civil Journal 1040

Pg 454

To Court: June 14 1988  
Transferred to Tim McMonagle

Civil Journal 1056 Pg 171

9/19/88

Prospectus of Penn Central Railroad Corp. filed May 25 1989

Communication filed by John J. McCoy  
May 25 1989

Communication filed by Docket dept. SS&P

Jul 31 1989

Pretrial statement of Deft. Little Miami Railroad Co.

Aug 11 1989

Annual Report Filed

Nov 8 1989

Affidavit of service by sheriff of Hamilton County

Nov 14 1989

Motion of the Little Miami Railroad Co. to dismiss filed

Jan 17 1990

Notice of appeal filed by Pltf. William Kuntz, III and copy(ies) mailed to the Appellee w/affidavit cf Wm. Kuntz.

To Court: Oct 08 1989

Pt. held

O.S.J. Vol. 1190

Pg 939

Notice Moved

Feb. 7, 1990

Pltf.-Appellant's a/b (illegible) and docketing statement (on the req. cal.), filed on CA No. 59136.

Feb 06 1990

Communication by American Research and Appraisal Center.

To Court: 12-8-89

Mot. of Little Miami R. Road Co. to dismiss is granted. O.S.J.

Notice Moved

Vol. 1210

Pg 916

The State of Ohio )

Cuyahoga County ) SS.

I, Gerald E. Fuerst, Clerk of The court of Common Pleas within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original Appearance Docket Entry Case #7544.

Now on file in my office.

Witness by hand and seal of said court this 26 day of February A.D. 1990.

GERALD E. FUERST, Clerk  
By KAREN FRANCE, Deputy

